

**United States Circuit Court  
of Appeals** 16

For the Ninth Circuit

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JAMES W. MALONEY, Collector of Internal Revenue of the  
United States for the District of Oregon  
*Appellant*

*v.*

WESTERN COOPERAGE COMPANY, a corporation  
*Appellee*

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Upon Appeal from the United States District  
Court for the District of Oregon

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**BRIEF OF APPELLEE**

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PAUL P. O'BRIEN,



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No. 9032

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Upon Appeal from the United States District  
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## BRIEF OF APPELLEE

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### JURISDICTION

This appeal involves a claim for refund of Federal excise taxes paid on the receipt of dividends during the period from June 16, 1933, to December 31, 1933. Judgment was rendered in favor of appellee on July 5, 1938, for the sum of \$6,449.72 with

interest, from which decision defendant below appealed on October 4, 1938. (R. 45-47.)

The jurisdiction of this Court is invoked by virtue of the provisions of Section 128 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### QUESTION PRESENTED

The sole question presented in this appeal is whether the dividends which the appellee paid after June 16, 1933, the effective date of the National Industrial Recovery Act, were "dividends declared before the enactment" of the Act.

### STATUTE AND OTHER AUTHORITY INVOLVED

National Industrial Recovery Act, c. 90, 48 Stat. 195:

"Sec. 213. (a) There is hereby imposed upon the receipt of dividends (required to be included in the gross income of the recipient under the provisions of the Revenue Act of 1932) by any person other than a domestic corporation, an excise tax equal to 5 per centum of the amount thereof, such tax to be deducted and withheld from such dividends by the payor corporation. The tax imposed by this section shall not apply to dividends declared before the date of the enactment of this Act."

## I. T. 2744, XII-2 Cumulative Bulletin 402:

“Following the established rule of construction, the expression ‘dividends declared’ as used in the statute is to be construed and applied according to its accepted legal meaning. Stated briefly, the declaration of a dividend by the board of directors of a corporation has the legal effect of creating the relationship of debtor and creditor between the corporation and the stockholder, and the rights of the stockholder as such creditor become immediately vested regardless of the fact that the dividend may be payable at some future time. In order for a dividend to be fully ‘declared’ within the meaning of the statute the action taken by the board of directors must be such as to create the relationship of debtor and creditor between the corporation and the stockholder, and the debt so created must be a legal and enforceable debt which is definite, final, and irrevocable. A dividend so declared of course effects an appropriation of surplus to the payment of the debt thereby created.”

## STATEMENT OF THE CASE

This is an action brought in the District Court of the United States for the District of Oregon, against the Collector of Internal Revenue, for the recovery of Federal excise taxes assessed and collected under Section 213 of the National Industrial Recovery Act. The case was tried before the court sitting without a

jury, jury having been waived by stipulation. (R. 12-13.) The facts were stipulated. (R. 13-21.) The District Court made special findings of fact and conclusions of law (R. 35-44), and gave judgment for the taxpayer in the sum of \$6,449.72, together with interest from December 28, 1935, from which judgment the Collector has appealed to this Court. (R. 45-47.)

The District Court made findings of fact as they were stipulated by the parties. The facts essential to a proper consideration of this appeal may be summarized as follows:

The appellee, plaintiff below, herein referred to as the taxpayer, is an Oregon corporation. On January 16, 1933, its board of directors at their annual meeting duly adopted and passed the following resolution: (R. 36, 37.)

*“Resolved*, that the Secretary and Treasurer of this Company be and he is hereby authorized, empowered and directed to pay monthly dividends of  $\frac{1}{2}$  of 1% each month for the year 1933 whenever in his judgment there are moneys available to pay the same and further that whenever in the judgment of said Secretary and Treasurer there are moneys available to increase the amount of said dividends for



any month or months thereof, said Secretary and Treasurer is hereby authorized, empowered and directed to pay such additional dividends.”

This resolution was identical in form and substance with resolutions adopted in previous years under which the taxpayer paid dividends amounting to one-half of one per cent. per month on its common stock during the entire period from January, 1925, to the close of 1933. (R. 37.) (In December, 1933, the dividend was one per cent.) During the entire calendar year 1933 the taxpayer's outstanding common stock was \$2,976,600. (R. 43.)

The dividends paid on the taxpayer's common stock in the first five months of 1933, that is, before the effective date of the National Recovery Act of June 16, 1933, were as follows:

Paid in Month of 1933	Total Dividend Paid	Par Value of Stock on Which Dividends Were Paid	Per Cent. of Dividend
January .....	\$14,883.00	\$2,976,600.00	0.5%
February .....	14,883.00	2,976,600.00	0.5%
March .....	14,883.00	2,976,600.00	0.5%
April .....	14,883.00	2,976,600.00	0.5%
May .....	14,883.00	2,976,600.00	0.5%
	<hr/>		<hr/>
	\$74,415.00		2.5%

The dividends paid by the taxpayer on its common stock after June 16, 1933, and prior to December 31, 1933, were as follows:

Paid in Month of 1933	Total Dividend Paid	Par Value of Stock on Which Dividends Were Paid	Per Cent. of Dividend
June .....	\$14,883.00	\$2,976,600.00	0.5%
July .....	14,883.00	2,976,600.00	0.5%
August .....	14,883.00	2,976,600.00	0.5%
September .....	14,883.00	2,976,600.00	0.5%
October .....	14,883.00	2,976,600.00	0.5%
November .....	14,883.00	2,976,600.00	0.5%
December .....	29,766.00	2,976,600.00	1.0%
	\$119,064.00		4.0%

The dividends so paid were paid under the resolution of January 16, 1933, and without any further resolution. (R. 37.) During the period from May 31, 1933, to December 31, 1933, the taxpayer's earned surplus, available for the payment of dividends, was never less than \$546,515.12 and at all times during the year 1933 the taxpayer's earnings and profits accumulated subsequent to February 28, 1913, were in excess of \$300,000. At all times during 1933, there was money available in the taxpayer's treasury to pay dividends on its common stock in amounts not less than one-half of one per cent. per month on its outstanding common stock of \$2,976,600. (R. 42, 43.)

## SUMMARY OF THE ARGUMENT

- I. The resolution of January 16, 1933, created the relation of creditor and debtor between the taxpayer and its stockholders.
- II. The dividends paid by the taxpayer between June 16, 1933, and December 31, 1933, were "dividends declared before the date of the enactment" of the National Industrial Recovery Act within the meaning of Section 213 (a) of the Act.

## ARGUMENT

### I

The resolution of January 16, 1933, created the relation of debtor and creditor between the taxpayer and its stockholders.

I. T. 2744, quoted above, provides that the term "dividends declared" is to be construed and applied according to its accepted legal meaning. It further provides:

"In order for a dividend to be fully 'declared' within the meaning of the statute the action taken by the board of directors must be such as to create the relationship of debtor and creditor between the corporation and the stock-

holder, and the debt so created must be a legal and enforceable debt which is definite, final, and irrevocable.”

It might well be argued that this ruling restricts the meaning of the term “dividends declared” to an extent not justified by the statute. However, for the purposes of this appeal we shall assume that the ruling is valid and imposes a proper standard whereby to test the dividends paid by Western Cooperage Company, and we shall show that under the authorities the resolution of January 16, 1933, adopted by the taxpayer’s directors, created the relation of debtor and creditor between Western Cooperage Company and its stockholders.

The declaration by a corporation of a dividend payable in cash creates a debtor-creditor relationship between the corporation and the stockholder. *Steel v. Island Milling Co.*, 47 Or. 293, 83 Pac. 783; *Bryan v. Welch et al*, 74 F. (2d) 964; *Staats v. Biograph Co.*, 236 Fed. 454; 11 Fletcher, Cyc. Corp. (Perm. Ed.), Sec. 5322, p. 786.

This general rule applies where the declaration makes the dividend payable at a future date, as well as in the case where the dividend is declared to be payable immediately. *Plant v. Walsh*, 280 Fed. 722;

*United States v. Guinzburg*, 278 Fed. 363; *Ford v. Snook*, 205 App. Div. 194, 199 N. Y. S. 630 (affd. 240 N. Y. 624, 148 N. E. 732); 11 Fletcher, Cyc. Corp. (Perm. Ed.), Sec. 5322, p. 791.

Furthermore, the general rule applies where, by the terms of the resolution declaring the dividend, the time for payment is specifically made dependent upon some future act of the directors or corporate officers.

*Northwestern Marble & Tile Co. v. Carlson*, 116 Minn. 438, 133 N. W. 1014, involved a resolution which declared a cash dividend "payable . . . at such time as the finances of the firm will in the judgment of the board of directors warrant." It was held that thereby the corporation became indebted to a stockholder and that the stockholder could enforce that debt as a counterclaim when sued by the corporation. The Minnesota Court said:

"The board of directors by the resolution declared a dividend, and its action was amply justified by the surplus and undivided profits of the corporation. No further action of the board was necessary to make the segregation of the amount of the dividend of each stockholder from the common mass of the corporate property. There was no qualification of the declara-

tion of the dividend, and its existence as a debt against the corporation was not dependent upon any further action of the board, but the debt was payable at such time as the finances of the corporation would in the judgment of the board of directors warrant. This provision as to the time of payment of the dividend must be construed in connection with the fact that a dividend had been rightfully declared and notice thereof given to the stockholders at their annual meeting. So construing the provision, we hold that the time of payment of the dividend was not a matter depending upon the discretionary future action of the board, but that it gave to the board a reasonable time in which to make the necessary arrangements for its payment; that is, the dividend was payable within a reasonable time."

See also *Beers v. Bridgeport Spring Co.*, 42 Conn. 17, where the resolution declared a cash dividend payable at such time as the directors might order. It was held that the declaration created a debt due to stockholders and payable within a reasonable time. In *Wallin v. Johnson City Lumber & Mfg. Co.*, 136 Tenn. 124, 188 S. W. 577, the declaration stated that the dividend should be "paid out at a later date on the order of the board of directors," and the Court held that it created a debt payable within a reasonable time.

The resolution in the present case could scarcely have been stronger or more unequivocal. It "authorized, empowered and *directed*" the Secretary and Treasurer to pay dividends of one-half of one per cent. per month "whenever in his judgment there are moneys available to pay the same." Here is no mere resolution that a dividend is declared or authorized. The Secretary-Treasurer was *directed* to pay monthly dividends in a specified minimum amount, one-half of one per cent. per month. He was given no option to pay or to omit payment.

The corporate earned surplus accumulated subsequent to February 28, 1913, and available for dividends, was in excess of \$300,000 throughout 1933, and the cash balances in the treasury were at all times sufficient to pay the dividends monthly in accordance with the resolution. The aggregate of dividends actually paid on common stock in 1933 was \$193,492, and on preferred stock \$7,504, a total of \$200,996. The facts bring this case squarely within the rule applied in *Northwestern Marble & Tile Co. v. Carlson*, *supra*.

It follows that the declaration of dividends in January, 1933, created a debt to the stockholders, and satisfied fully the test provided by I. T. 2744.



## II

The dividends paid by the taxpayer between June 16, 1933, and December 31, 1933, were "dividends declared before the date of the enactment" of the National Industrial Recovery Act, within the meaning of Section 213 (a) of the Act.

The question whether various resolutions constituted declarations of dividends within the intendment of Section 213 (a) of the National Industrial Recovery Act has given rise to a small, but in the main well-considered, group of federal decisions. Since each case turns solely on the wording of the particular resolution involved, the decisions have sometimes been in favor of the Government and sometimes in favor of the taxpayer. But despite the diverse results reached, the cases are easily reconciled on the basis of a well-defined distinction which has been ignored by counsel for the appellant in the indiscriminate citation of cases in his brief.

This distinction is stated most explicitly in *United States v. Murine Co., Inc.*, 90 F. (2d) 549 (C.C.A. 7th, 1937), in which the Court, after reviewing the authorities relied on in the lower court, said:

"An examination of these authorities, however, convinces us that they afford very little support, if any, to appellee's contention. They all in vary-



ing degree hold that language used, which merely extends the time of payment, is not a limitation upon the obligation of the corporation to pay dividends. In other words, a declaration to pay dividends is not invalid on account of language used which merely extends or makes uncertain the time of payment.”

The resolution in the *Murine Co.* case contained the following proviso:

“ . . . in the event, in his judgment, the condition of the treasury on any of these dates shall not warrant the payment of such dividends, he may omit the same or defer the payment until some later date . . . ”

(It should be noted that the brief for the Government does not quote that portion of the resolution following the word “same”.) The Court held that the use of the word “omit” prevented the resolution from becoming a valid declaration, and said:

“In the instant case, if the resolution had merely authorized the treasurer to defer the payments until some later date, the cases cited would be applicable and controlling, but to give the resolution such construction it seems to us is to ignore entirely the words ‘he may omit the same.’

“Some of the definitions for the word ‘omit’ as given by Webster’s Dictionary are: ‘To leave out, to leave undone, to let go, to refrain or

cease from keeping.’ We see no reason why the word as used here should be construed to have a meaning different from that which it ordinarily bears. The resolution clearly authorizes the treasurer to do two things—either ‘omit’ payment or ‘defer’ payment. The terms are not synonymous and they cannot mean the same thing. The use of the word ‘omit’ serves to defeat the establishment of a legal and enforceable debt which was definite, final, and irrevocable. To hold otherwise is to ignore the certain and unambiguous meaning of that term.”

It is interesting to note that the Court construes the word “omit” in its ordinary meaning to deny the exemption and uphold the tax while in I. T. 2744 the term “dividends declared” is given a restricted “legal meaning” for a like purpose.

Like the *Murine* case, the cases of *Carney v. Crocker et al*, 94 F. (2d) 914, and *United States v. Southwestern Portland Cement Co.*, 97 F. (2d) 413, cited by counsel for the appellant, involve resolutions limiting the *obligation* of the corporation to pay dividends rather than merely leaving the time of payment undetermined. Thus, in *Carney v. Crocker*, *supra*, the declaration of the dividend was “subject to the approval of the President and Treasurer and Assistant Treasurer,” and the Court correctly held that

since the declaration of the dividend was solely conditioned upon the approval of the officers named, it was not a fully declared dividend.

In *United States v. Southwestern Portland Cement Co.*, supra, the clause in the resolution, construed by this Court as qualifying the declaration of a dividend, read, "until otherwise ordered by the Board of Directors." This Court applied the distinction set out in the *Murine* case and held that since the board of directors had reserved the power to rescind the declaration entirely, no dividend had actually been declared. The Court said:

"In view of the final clause thereof, the declaration of dividend in the instant case is not absolute and unqualified in its terms and, therefore, not fully declared within the meaning of the statute. In fact, the appellee concedes, 'The board of directors of the Corporation, at the time of the adoption of the dividend resolution on March 10, 1932, reserved the power to amend the said resolution and thereby in effect could rescind the declaration of such future annual dividends as had not become debts of the Corporation.' This means that the board could not be compelled to pay a dividend under the resolution because it had the power to order otherwise. If this be true, as it must be under the resolution, a dividend would not be fully declared, in the sense that it was a debt of the

corporation and could not be rescinded, until it was actually paid or some other affirmative action taken. No other affirmative action was taken.”

The resolution in the present case, in sharp contrast with that in the *Southwestern Portland Cement Co.* case, was not a continuing resolution but was restricted to the year 1933. Furthermore, it reserved no power of revocation either in the board or any officer.

Counsel for the Government also cites *Alexander & Alexander, Inc., v. United States*, 22 F. Supp. 921, and *Lockhart Iron & Steel Co. v. O'Toole*, 22 F. Supp. 919, in support of his position. Again in these cases there is brought out the distinction between a limitation on the obligation to pay and a mere discretion as to the time of payment. In the *Alexander* case, the resolution provided that “this rate of dividend payment shall continue until such time as the Board of Directors shall otherwise order.” Obviously, this language, as the Court found, lacked “the finality necessary to create a binding debt from the company to the stockholder . . .”

Similarly, in *Lockhart Iron & Steel Co. v. O'Toole*, supra, the Court found that the declaration of a quar-

terly dividend payable "until further notice" did not irrevocably commit the corporation to pay. Accordingly, it was held that the dividend paid after June 16, 1933, was not exempt under Section 213 (a).

On the other hand, there are a number of cases similar to the instant case holding that mere uncertainty as to the time of payment of a dividend does not invalidate the declaration of the dividend as lacking finality. In many of these cases the language of the resolutions involved is identical in its import (but not so strong or peremptory) with that found in the taxpayer's resolution adopted January 16, 1933.

Thus in *Thompson Mfg. Co. v. United States*, 22 F. Supp. 830 (Court of Claims, 1938), the resolution adopted January 10, 1933, provided as follows:

"Resolved by the Stockholders in Annual Meeting assembled, that the continued maintenance of a Surplus as large as that shown by the treasurer's report is unnecessary, and we urge and recommend that the directors declare a dividend of not less than eighty per cent (80%). Voted: to declare a dividend of 80% payable soon as convenient."

In order to obtain the cash to pay this dividend, the corporation had to withdraw a considerable sum from the savings bank and had to sell some bonds. Pay-

ment of the dividend was not actually made until October, 1933. The Court held that the decision in *United States v. Murine Company, Inc.*, supra, was not decisive under this resolution, and said:

“In support of this claim *United States v. Murine Co.*, 7 Cir., 90 F. 2d 549, is cited, but in that case the language used with reference to the dividend was not definite or final. In the opinion a number of cases are cited showing that a declaration to pay dividends ‘is not invalid on account of language used which merely extends or makes uncertain the time of payment.’ The provision that the dividend was to be paid ‘soon as convenient’ merely made the time of payment uncertain and did not invalidate the declaration of it which was expressly made. It follows that the tax upon the dividends was wrongfully collected.”

The case of *Alabama Pipe Co. v. United States*, 21 F. Supp. 173 (Court of Claims, 1937), involved a resolution adopted February 19, 1932, which read:

“Resolved that the accumulated dividends upon the company’s outstanding preferred stock for the year 1931 may be paid when and if the company’s finances make it advisable to do so, the decision to be left to the judgment of the President and General Manager; also, that the smaller stockholders may be paid first; also that by agreement between or among the three groups



of the larger stockholders (Hamilton-Kilby-Byrd) any of said group may be paid first, either in full or on account, but that no payment at all shall be made to anyone unless the President and General Manager decides that it shall be done, at the time.' ”

The Court, after pointing out that at the time the resolution was adopted the plaintiff had surplus and cash on hand sufficient to pay the dividend, that actually a part of the dividend had been paid when the resolution was adopted, and that a major portion of the dividends were paid prior to the enactment of the National Industrial Recovery Act, held that the dividends were exempt from tax. Counsel for the Government claims that these circumstances are not present in the instant case. Yet, as the stipulated facts show, the appellee at all times had sufficient surplus and cash on hand to pay the dividend, payment had been regularly made under similar resolutions for over eight years, and prior to June 16, 1933, \$74,415.00 of a total of \$193,479.00 had actually been paid on the common stock dividend. Far from being distinguishable on its facts, the *Alabama Pipe Company* case is strong authority for the appellee's position.

In *West Bay City Sugar Co. v. United States* (District Court of Michigan, 1936, not officially reported), 18 A. F. T. R. 1317, a resolution adopted March 31, 1933, read as follows:

“Resolved, ‘that there be a special dividend of \$60,000 credited to account of bills payable on account of surplus March 31, 1933, and to be paid as the same may be available from treasury funds.’ ”

The dividend in question was not paid until after the effective date of the National Industrial Recovery Act. Again, the Court held that it was a dividend “declared” prior to the effective date of the act and therefore exempt from the tax imposed by Section 213 (a).

The case of *Evening Star Newspaper Co. of Washington v. United States*, 16 F. Supp. 1020 (Court of Claims, 1936), likewise supports the appellee’s position. There a resolution was adopted on April 10, 1914, reading as follows:

“ ‘Resolved, That the President of the Company be authorized and directed to pay such dividends from the profits of the Company as will, in his judgment, be consistent with the policy of the Company to maintain reserves ample for all emergencies.’ ”



Acting upon the authority thereby granted, the corporation paid dividends in 1933 subsequent to the effective date of the act aggregating \$420,000. The Court of Claims held that those dividends were "declared" before the date of the act and rendered judgment against the United States for tax and interest improperly assessed and collected.

The taxpayer's resolution of January 16, 1933, contained these words:

" . . . and further that whenever in the judgment of said Secretary and Treasurer there are moneys available to increase the amount of said dividends for any month or months thereof, said Secretary and Treasurer is hereby authorized, empowered and directed to pay such additional dividends."

Pursuant to that authority the Secretary and Treasurer in December paid an extra dividend of one-half

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NOTE.—In addition to the cases discussed above, the following decisions have involved Section 213 (a) of the National Industrial Recovery Act, but do not bear on the issue presented by the instant case: *United States v. Southwestern Railroad Company*, 92 F. (2d) 897; *Realty Investment Co. v. Moore*, 22 F. Supp. 918; *Trust Holding Corporation v. United States* (District Court of West Virginia, 1938, not officially reported) — see paragraph 5.300, 1938, Prentice-Hall Tax Service; *Greenwood Compress and Storage Co. v. Fly* (Southern District of Mississippi, 1938, not officially reported) — see paragraph 5.587 Prentice-Hall Tax Service, 1938. These cases are cited only that the Court may have before it all decisions involving Section 213 (a) of the Act.

of one per cent. (a total of one per cent. in December). Under some of the cases cited above such extra dividend would have been exempt from the tax. However, we frankly admit that the extra dividend for December stands on a different footing from the regular dividends of one-half of one per cent. for each month of 1933. We concede that the exercise of the discretion of the Secretary and Treasurer to pay an additional amount was necessary to create a debtor-creditor relationship with respect to such additional amount. That discretion or judgment was not exercised until the payment was made in December, and therefore under I. T. 2744 and *Carney v. Crocker*, supra, *United States v. Murine Co.*, supra, *Alexander & Alexander, Inc., v. United States*, supra, and *United States v. Southwestern Portland Cement Co.*, supra, the extra dividend was not finally declared in January within the meaning of Section 213 (a). It was the recognition by the taxpayer of the different status of this extra December dividend from that of the regular monthly dividends which prompted the taxpayer not to include in its claim for refund the tax on the extra dividend of December.

The exempt status of the regular dividends paid pursuant to the taxpayer's resolution of January 16,

1933, is clearly illustrated when that resolution and the resolutions in the cases discussed above are scrutinized in the light of the test laid down by the *Murine* case, *supra*. It will be recalled that the taxpayer's resolution provided:

“*Resolved*, that the Secretary and Treasurer of this Company be and he is hereby authorized, empowered and directed to pay monthly dividends of  $\frac{1}{2}$  of 1% each month for the year 1933 *whenever in his judgment there are moneys available to pay the same . . .*” (Italics ours.)

The following is a summary of the essential words of the resolutions which have been held to satisfy the statute with respect to “dividends declared” because the limitation or uncertainty related only to *time of payment*.

1. “soon as convenient”  
*Thompson Mfg. Co. v. United States*,  
*supra*.
2. “. . . may be paid when and if the company's finances make it advisable to do so, the decision to be left to the judgment of the President and General Manager; . . .”  
*Alabama Pipe Co. v. United States*, *supra*.
3. “. . . to be paid as the same may be available from treasury funds.”  
*West Bay City Sugar Co. v. United States*,  
*supra*.

4. “‘ . . . such dividends . . . as will, in his judgment, be consistent with the policy of the Company to maintain reserves ample for all emergencies.’ ”

*Evening Star Newspaper Co. v. United States*, supra.

In contrast are the resolutions set out below which have been held insufficient to meet the statutory standard with respect to “dividends declared” because of limitation on *the obligation of the corporation to pay*.

1. “‘ . . . subject to the approval of the President and Treasurer and Assistant Treasurer.’ ”

*Carney v. Crocker*, supra.

2. “‘ . . . until otherwise ordered by the Board of Directors.’ ”

*United States v. Southwestern Portland Cement Co.*, supra.

3. “‘ . . . until further notice.’ ”

*Lockhart Iron & Steel Co. v. O’Toole*, supra.

4. “‘ . . . until such time as the Board of Directors shall otherwise order.’ ”

*Alexander & Alexander, Inc., v. United States*, supra.

5. “‘ . . . he may omit the same.’ ”

*United States v. Murine Co.*, supra.

When the taxpayer's resolution is compared with those listed above, it becomes obvious that the language "whenever in his judgment there are moneys available to pay the same" brings the instant case clearly within the class of cases holding the dividends "finally declared" and exempt from tax. In addition to this conclusion forced by the literal wording of the taxpayer's resolution, the surrounding facts in the present case make it doubly evident that the dividends in question were "declared" prior to June 16, 1933. Thus, as noted earlier, the taxpayer had paid dividends regularly for eight years under similar resolutions, a large portion of the total dividends had been paid prior to June 16, 1933, and at all times the taxpayer had on hand sufficient surplus and cash to pay the entire dividend.

It is submitted, therefore, that the judgment of the lower court declaring the appellee's dividends to be exempt was correct and should be sustained.

Respectfully submitted,

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